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In The Supreme Court Of The State Of Utah

GEORGE SALTAS.

Plaintiff and Respondent.

vs.

DAVID A. AFFLECK, doing business
under the name and style of D. A.
AFFLECK GROCERY.

Defendant.

KENNETH BUTTE.

Defendant and Appellant.

Appeal from the Third Judicial District Court,
In and for Salt Lake County, State of Utah
Honorable Clarence E. Baker, Judge

REPLY BRIEF

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INDEX

	Page
RESPONDENT'S CASES	2
INJECTION OF INSURANCE INTO THE CASE	9
MISCONDUCT DURING THE TRIAL	10
ARGUMENT TO THE JURY	12
ERRONEOUS INSTRUCTIONS	16
Instruction No. 11	16
Instruction No. 12	17
Instruction No. 14	18
Instruction No. 17	19
INSTRUCTIONS DENIED	19
CONCLUSION	20

Respondent's Authorities

American Fork City v. Charlier, 45 Ut. 251, 154 Pac. 759	18
American Railway Express v. Lancaster, (Ky.) 251 S. W. 670	18
Berry v. Dewey, (Kan.) 172 Pac. 27	2
Bright v. Thatcher, (Mo.) 215 S. W. 788	2
43 C. J. 579	17
46 C. J. 207	7
Egan v. O'Malley, (Wyo.) 21 Pac. (2d) 821	9
El Paso Railroad Co. v. Buttery, 216 S. W. 817	2
Gibson v. Wineman, 106 So. 826	4
Klinge v. Southern Pac. Co., 89 Utah 284, 57 Pac. (2d) 567	5
Louisville Ry. Co. v. Smith, (Ky.) 265 S. W. 29	2
McMahon v. Flynn, (Minn.) 191 N. W. 902	2
Neary v. Northern Pac. R. R. Co., (Mont.) 110 Pac. 226	18
Pierre v. Powell Box Co., 77 So. 945	5
Reid v. Owens, (Utah) 95 Pac. (2d) 680	10-15
Roper v. Greenspon, (Mo.) 198 S. W. 1107	17
Skidmore v. Seattle, (Wash.) 244 Pac. 545	5
Wirth v. Alex-Dussell Iron Works, 74 So. 551	5

Appellant's Authorities

	Page
Carpenter v. Dickey, 26 N. Dak. 176, 143 N. W. 964	8
Coke v. Timbey, 57 Utah 53, 192 Pac. 624	8
46 C. J. 211	7
Dee v. San Pedro, L. A. & S. L. R. Co., 50 Utah 167, 167 Pac. 246	8
Fry v. Smith, (Iowa) 253 N. W. 147	17
Georgeson v. Nielson, (Wis.) 260 N. W. 461	14
Harris v. Ogden Steam Laundry Co., 39 Utah 436, 117 Pac. 700	8
Jensen v. Denver & Rio Grande Co., 44 Utah 100, 138 Pac. 1185	6
Jensen v. Utah Ry. Co., 72 Utah 366, 270 Pac. 349	19
Knutson v. Lurie, (Iowa) 251 N. W. 147	16
Mason v. Union Pac. R. R. Co., 7 Utah 77	5
Parker v. Bushouse, (Mich.) 236 N. W. 222	10
Paxton v. Spencer, 71 Utah 313, 265 Pac. 751	8
Reed v. Warren, (La.) 132 So. 250	3
State v. DeWeese, 51 Utah 515, 172 Pac. 290	8

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Case
No. 6190

KENNETH BUTTE,
Defendant and Appellant.

REPLY BRIEF

We will discuss the questions in the order of respondent's brief.

Apparently counsel for respondent fails to appreciate the nature of and the amount of damages that are recoverable under our Utah death statute, particularly by a father for the death of an *adult son*. At least the authorities cited by counsel so reflect, inasmuch as

he has not cited one case in point sustaining his contention that the verdict rendered by the jury on the first trial was inadequate.

RESPONDENT'S CASES

First, we call attention to the fact that *how large a verdict the jury might have rendered* under the evidence is wholly beside the point. There is a large range between inadequate damages and excessive damages, particularly in a death case where actual pecuniary loss is uncertain. The question is not how large a verdict the jury might have rendered, but was the verdict so inadequate that it could be said the trial court was justified in setting it aside under Section 104-40-7, Revised Statutes of Utah 1933, now relied upon by respondent. Clearly the following cases have no application in that they *simply consider what damages were not excessive*.

Berry v. Dewey, (Kan.) 172 Pac. 27;

El Paso Railroad Co. v. Buttery, 216 S. W. 817,
(apparently respondent's citation of this case
is incorrect.)

Bright v. Thatcher, (Mo.) 215 S. W. 788;

McMahon v. Flynn, (Minn.) 191 N. W. 902;

Louisville Ry. Co. v. Smith (Ky.) 263 S. W. 29.

Klinge v. So. Pac. Co., 89 Utah 284, 57 Pac. (2d) 367, had to do with permanent injuries for loss of an arm, causing loss of earning power for life and was *not an action for death*.

Skidmore v. Seattle (Wash.) 244 Pac. 545, had to do with a right of a father to recover for the value of the services of a minor child from the time of injury until majority. Deceased was fifteen at the time of his death. It is significant that nothing was awarded either in the trial court or the appellate court for pecuniary loss to the father after deceased would have reached his majority.

Pierre v. Powell Box Company, 77 So. 943, and *Wirth v. Alex-Dussell Iron Works*, 74 So. 551, both come from the State of Louisiana. Why the damages in these cases were inadequate is obvious. At page seventeen of our original brief, we purposely pointed out that the Louisiana death statute is fundamentally different from our Utah statute, in that in Louisiana not only actual damages to the heirs, including anguish and suffering caused such heirs, are allowed, but *also such damages as the deceased might have recovered had he survived*. See *Reed v. Warren* (La.) 132 So. 250. In the *Pierre* case which was for the death of a sixteen year old son, the court had this to say:

“In view of the fact that plaintiffs are suing *in the right of deceased*, who suffered much dur-

ing the say seventeen months which intervened between the accident and his death, *and also in their own right* for the loss by death of the prospective support, companionship and felial affection, upon which they were entitled to rely, we are further of the opinion that the damages awarded by the district court should be increased. * * * His right arm was caught between the wheels and crushed as a stalk of sugar-cane is crushed between the rollers of a mill, and he sustained serious injury to his side."

Contrast our Utah statute, where only actual pecuniary damages sustained by the heirs on account of the death are recoverable and nothing for suffering of deceased or his injury, or anguish and suffering of the heirs. *Wirth v. Alex-Dussell Iron Works*, supra, the other Louisiana case cited by respondent, was for the death of a husband and father leaving a widow and three minor children, he being their sole support.

Gibson v. Wineman, 106 So. 826, a Mississippi case is distinguishable on the same grounds as the Louisiana cases. The Mississippi statute unlike Utah was dual in character, allowing damages deceased could have recovered for the injury, and also damages caused the heirs by the death. The following quotation from the case reveals the character of the Mississippi statute:

"He suffered intense pain. There was no element of contributory negligence * * * and appellant was entitled to recover damages of every kind to the decedent and also all damages of every kind to her as the widow."

Specifically, what item of damage or damages the jury neglected to consider is nowhere disclosed by plaintiff, and as we have specifically pointed out, each of the cases cited by plaintiff is readily distinguishable from the instant case. We are not concerned with a case wherein recovery can be had for services of a minor child, for services of a deceased wife, nor for loss of support of a father or husband having a legal obligation to support his wife and children. This case has nothing whatsoever to do with damages recoverable in a personal injury action, with loss of earnings, injury, pain, and suffering and the like. Our statute is not a *survival statute* like those of Louisiana and Mississippi, (*Mason v. Union Pacific Railroad Company*, 7 Utah 77), but only pecuniary damages resulting to the heirs (in this case the father of deceased) can be recovered. Nothing can be allowed for sentimental loss or grief and sorrow. How large a verdict the jury might have rendered is wholly beside the point. The value of a human life has nothing to do with the measure of damages in an action for wrongful death under our Utah Statute as counsel would have believe in his closing argument, where he attempts to inject the idea that, "Nothing is more precious than life."

We consider it unnecessary here to again specifically enumerate all of the reasons fully set out in our original brief why in view of all the evidence, including cross examination, the actual loss to plaintiff was not

necessarily substantial, and that the jury as fair minded men were fully justified in returning a verdict of \$800.00. We feel it unnecessary to call specific attention to each of the numerous cases cited in our original brief where damages ranging from nominal damages to a few hundred dollars have been held adequate, particularly in cases of the death of an adult, unmarried man, and that it was error to set aside such verdicts, the measure of recovery being peculiarly a question for the jury.

Under Section 104-40-7, relied on by respondent, the court cannot set aside a verdict for inadequacy of the damages where the evidence justifies the verdict rendered. In *Hirabelli v. Daniels*, it was error to set aside a verdict in an action for personal injuries for \$1.00 for pain and suffering and for \$22.00 reasonable medical treatment, although \$50.00 had actually been paid for such treatment. The court there says:

“To justify the court in interfering, it should be made to appear that the jury *plainly disregarded or misconceived* the instructions or the evidence or acted under the influence of passion or prejudice.”

In *Jensen v. Denver & Rio Grande Company*, 138 Pac. 1185, 44 Utah 100, at pages 121 and 122, referring to what was then our present Section 104-40-7, the court said:

"Neither is either party on that question entitled to the judgment of the court below in a case of tort tried to a jury. Both parties, as to that, are entitled to the unprejudiced judgment of the jury. That is exclusively within their province. Their power and discretion, when properly exercised and when they have been properly directed as to the measure of damages and the mode of assessing it, may not be interfered with merely because the court above or below may think the amount rendered is too large, or even may think it appears to be larger than the evidence apparently or fairly justifies. A court, vacating a verdict and granting a new trial by merely setting up his opinion or judgment against that of the jury, but usurps judicial power and prostitutes the constitutional trial by jury. * * * It should clearly be made to appear that the jury totally mistook or disregarded the rules of law by which the damages were to be regulated, or wholly misconceived or disregarded all the evidence, and by so doing committed gross and palpable error by rendering a verdict so enormous or outrageous or unjust as to be attributable to neither the charge nor the evidence, but only to passion or prejudice."

And counsel in referring to 46 C. J., page 207, page 11 of respondent's brief, fails to quote from page 211 as follows:

"In some jurisdictions, especially under statutes, the inadequacy must be so great as to indicate passion, prejudice, or other improper motive on the part of the jury."

And Utah, among other states specifically enumerated, is listed.

Appellant attempts to make a point of the fact that the jury deliberated for only an hour. We see no reason why this would not be sufficient to jurors of ordinary intelligence, particularly when they had already heard the evidence (on damage only one witness) and had full opportunity to hear the arguments of counsel. The jury was properly instructed on the measure of damages and it is presumed they followed the instructions of the court. *Paxton v. Spencer*, 265 Pac. 751, 71 Utah 313 at page 326; *Coke v. Timbey*, 192 Pac. 624, 57 Utah 53, at page 60; *Dee v. San Pedro L. A. and S. L. R. Co.*, 167 Pac. 246, 50 Utah 167 at page 188; *Harris v. Ogden Steam Laundry Company*, 117 Pac. 700, 39 Utah 436. It is assumed that the jurors selected were men of ordinary intelligence, with minds of their own, and conscientious in respect to their duties. *State v. DeWeese*, 172 Pac. 290, 51 Utah 515 at page 524. And until the contrary clearly appears, it must be presumed that the jury, being fair-minded men, in rendering the verdict expressed their honest judgment. *Carpenter v. Dicky*, 26 N. Dak. 176, 143 N. W. 964.

All of the jurors in the instant case were agreed the damages would be between \$500.00 and \$1,000.00. None were in favor of a larger verdict. (Pff. Tr. 103-106). It is not likely that all the jurors disregarded the evi-

dence or instructions, and there was no showing to the effect in support of the motion. The burden was on the plaintiff in this case to prove actual pecuniary loss to plaintiff, and little, if any, was shown. No special damages were asked for. There was no showing of passion or prejudice, nor a plain disregard by the jury of the instructions of the court, or the evidence in the case, as required by the Statute. The verdict of \$800.00 was fairly and justly rendered and was certainly justified by the evidence. We respectfully submit that the trial court erred in setting aside the verdict of the jury on the first trial.

INJECTION OF INSURANCE INTO THE CASE

Although *Egan v. O'Malley*, (Wyo.) 21 Pac. (2d) 821, page 16 respondent's brief, goes about as far as any of the cases in permitting examination of the jurors on voir dire, and even in that case, there was no mention of any specific insurance company, and *there was no further reference or suggestion of insurance after the voir dire examination and during the trial of the case*. The court says on page 823:

"There appears to have been no further reference made to the matter after the necessary questions were put and answered or after the conclusion of the voir dire examination of the jurors."

The Egan case was one of first impression in Wyoming.

and like in *Balle v. Smith*, a suggestive procedure was outlined in questioning jurors as a caution to attorneys in future cases. This and the *Balle v. Smith* case should not constitute a license for attorneys to over-emphasize the matter of insurance before the jury by the asking of unnecessary questions, even on voir dire examination, and as stated in *Parker v. Bushouse* (Mich.) 236 N. W. 222, cited in both *Balle v. Smith* and the *Egan* case, further reference to insurance during the trial of the case should be excluded "under penalty of a reversal of the case."

MISCONDUCT DURING THE TRIAL

"Right after the accident you made out an affidavit to—you gave a statement to a man by the name of Parkinson, who is an adjustor for an insurance company?" There is no mistaking here that counsel himself injected not only the word "adjuster" but directly connected the name of Parkinson, who counsel well knew was actually associated with Mr. Stewart in the defense of defendant Affleck. Nor can it be questioned that direct reference was made to the "insurance company."

By what stretch of the imagination counsel excuses this misconduct by reason of *Reid v. Owens*, (Utah) 93 Pac. (2d) 680, we are unable to understand. In that case the liability of the defendant father for the negligent acts of his son was only provable by the admission of

the father that on account of the carelessness of the son, he had taken out insurance to protect him. The admission was a necessary part of plaintiff's case. There is no such necessity when a witness is examined on cross examination in connection with a written statement, when the contents of the statement are what the court and jury are concerned with and not the fact that the statement was given to an adjuster for an insurance company.

We do not question the right of counsel on either side to examine a witness in connection with a statement. That does not necessitate or justify any reference to an insurance company or an adjuster or anything of that kind.

Just what use counsel intended to make of the statement to Parkinson, if any, is very vague. He claims it was a statement made right after the accident, but Mr. Stewart offered counsel such statement made to Mr. Parkinson on the 28th day of January, 1938, the day following the accident, the only statement made, but counsel declined to use it. Was the question asked in good faith? Counsel claims ~~it~~ was important to show that the witness had previously told Parkinson that she had not seen the car until it loomed right in front of the car in which she was riding, *yet counsel never offered at any time to prove that the witness made any such statement to Parkinson.*

But even if we should grant, which we do not, that there was some legitimate purpose in referring to the statement made to Parkinson, the authorities all hold that it is unnecessary and improper to refer to an insurance company or an adjuster. We will not undertake here to again comment on the numerous cases which condemn the attempt on counsel's part to bring out the fact that a certain statement was given to an agent for an insurance company, notwithstanding the statement itself might be used for some legitimate purpose at the trial. On this point we invite careful consideration to the cases cited on pages 41 to 53 of our original brief. The courts all condemn such reference to insurance, whether by counsel himself, or through a witness by the obvious efforts of counsel, and notwithstanding that such statement might otherwise serve a legitimate purpose.

ARGUMENT TO THE JURY

Neither is there any misunderstanding that counsel was guilty of deliberate misconduct in his closing argument to the jury, when he left no doubt in the jurors' minds that an insurance company was defending the action. Even eliminating the word "ADJUSTER" to which counsel objects, (reference is made to exact words in abstract) his argument was equally effective. He had already himself deliberately brought out in the evidence the fact that Norma Chamberlain had *right after the accident made out a statement to Parkinson, an*

adjuster for an insurance company, and in view of this and his past examination of each juror on voir dire, his argument that "on the day of the accident or soon thereafter, an INVESTIGATOR was out at the scene of the accident" could only be suggestive of one thing, and that was the ADJUSTER to whom Norma Chamberlain right after the accident had given a statement. Whether the word INVESTIGATOR or ADJUSTER was used is insignificant. To the lay mind they are synonymous, and the jury was well educated during the trial. It is the course of improper conduct of counsel throughout the trial of which appellant complains. Counsel's argument that "defendant secured an attorney who spends all his time in the defense of this class of cases" is not disputed in any particular. The court had already denied defendant's vigorous objections to the obvious purpose of counsel in examining each and every juror to an unnecessary extent on insurance, and specifically the Northwest Casualty Company, and had already without even reprimanding counsel overruled (Tr. 197, Ab. 97) defendant's objection to counsel's questioning Norma Chamberlain about the insurance adjuster. The harmful effect of arguing matters in the presence of the jury is well known to counsel. How then, can he claim that appellant's objection to his argument to the jury was not timely, simply because appellant's counsel saw fit to not discuss and emphasize insurance before the jury, but rather make proper and timely objection immediately after the jury had withdrawn, but

before the instructions and exhibits were delivered to them. See Tr. 321. Objections of counsel and comments of the court and discussions before the jury would undoubtedly do further damage. As pointed out in *Georgeson v. Nielson*, (Wis.) 260 N. W. 461, that is often exactly what counsel for plaintiff is seeking. In that case it is said:

“Objection to the remark of opposing counsel enhances likelihood that the intended effect will be produced both by attracting attention to it, and by invoking a repudiation. Remark being made, or made and repudiated, the intended effect is probably produced. * * * Even a reprimand to offending counsel does not cure the wrong done to litigants by prejudicial remarks.”

Counsel seems to object to the fact that appellant preserved a record of this case and claims the procedure of appellant as unorthodox in introducing the insurance policy in evidence for the benefit of the court to show that the coverage under the policy did not extend to Kenneth Butte as an individual using the truck for his own purposes. Certainly Kenneth Butte was entitled to a fair trial without the wrongful injection of insurance into the case. Certainly counsel for Kenneth Butte had not only the right, but the duty to see that Kenneth Butte got a fair trial. The common attempt in personal injury actions to wrongfully get before the jury the matter of insurance is well-known among practicing attorneys and trial judges, as evidenced by the express

statements of plaintiff's counsel in this case, and counsel for defendant in such cases is called to guard against such prejudicial matter. We see no point to counsel's objection that appellant preserved a record for review.

As this court stated in *Reid v. Owens*, supra, "we would be closing our eyes to a fact well-known to trial courts and trial lawyers were we to assert that the probability of any jury being influenced in determining the question of liability and the question of the amount of recovery by the fact that an insurance company would pay the damages assessed is so remote as not to challenge judicial notice." In our original brief, we have set forth any number of cases which definitely hold that the injection of insurance into a case is so highly prejudicial that it cannot be said defendant has received a fair trial either on the issues of liability or on the issues of damage, and an instruction of the court cannot remove the probability of prejudice and there is reversible error. In this case, insurance was injected into the case during every important step of the trial, on voir dire examination of each juror, during the trial of the case on examination of witnesses, in argument to the jury, and was even discussed in the jury room. (Ab. 31). Counsel disregarded all precautions outlined in *Balle v. Smith*. No opportunity was lost to prejudicially inform each and every jurymen on voir dire examination. Misconduct during the trial in the examination of witnesses or in argument to the jury after voir dire examination proves counsel's lack of good faith and requires a reversal.

ERRONEOUS INSTRUCTIONS

Respondent states generally that "all" erroneous instructions were cured when such instructions were read as a whole. Such a sweeping statement evades the issues and points of law presented for review in our original brief. It is significant that counsel wholly fails to discuss the most serious errors contained in the instructions.

Instruction No. 11

To simply state that this erroneous instruction was cured by another instruction stating the general rule that "one has a right to assume that others using the highway will use reasonable care until put on notice to the contrary," but sidesteps the most hurtful effect of said instruction. The important point is that the instruction erroneously tells the jury that it was the duty of Kenneth Butte TO AVOID COLLIDING WITH ANY PERSON OR OTHER CAR. The erroneous and misleading effect of such statement defining the duty of defendant, can be appreciated by the fact that average jurors are not familiar with abstract rules of law. Their minds are not like trial judges and attorneys. To tell the jury that it is the duty of the defendant TO AVOID COLLIDING WITH ANY PERSON OR OTHER CAR ON THE HIGHWAY is but to tell the jury the defendant was at fault if his car collided with the one in which deceased was riding. In *Knutson v. Lurie*,

(Iowa) 251 N. W. 147, and *Fry v. Smith*, (Iowa) 253 N. W. 147, it was held that even a portion of the same instruction could not cure another part of such instruction wherein the duty of defendant was erroneously defined, the jury in such instance being likely to feel bound by the absolute duty. We submit this instruction is erroneous, confusing, self-contradictory, and calculated to mislead the jury.

Instruction No. 12

The authorities respondent has cited in an effort to sustain instruction No. 12 have no application to the instant case in that the city ordinance relied on in the instant case is *void on its face*, and specific objection (Dft. Ab. 125) was made to the giving of said instruction. It is not necessary to specifically plead the invalidity of an ordinance in such case. 43 C. J., page 579, cited by respondent reads as follows:

“Since an ordinance *which is not void on its face* is presumed to be valid, one who relies on its invalidity must plead this fact and allege facts showing it to be invalid.”

In *Roper v. Greenspon*, (Mo.) 198 S. W. 1107, the ordinance was in fact valid, and it was, therefore, error to refuse to admit it in evidence. On page 1110 of the opinion, the actual holding of the court is stated:

“We hold the ordinance in question a valid one and that for this reason, there was error in refusing to admit it in evidence.”

In *Neary v. Northern Pacific Railroad Company*, (Mont.) 110 Pac. 226, page 28 respondent's brief, the ordinance was not void on its face, and the same is true of *American Railway Express Company vs. Lancaster*, (Ky.) 251 S. W. 670, page 31, respondent's brief, which case did not even have to do with the invalidity of the ordinance, and note the quotation from *American Fork City v. Charlier*, 43 Utah 231, 134 Pac. 739, page 29 respondent's brief, where an exception is noted "where it appears *on the face of the ordinance* that the city exceeded the power."

In view of the fact that the ordinance in the instant case is clearly void on its face, and specific objection was made to the giving of said instruction in the trial court, it was error to submit such instruction to the jury.

Instruction No. 14

Counsel attempts to avoid the point that although this instruction placed upon the jury the absolute duty of finding for plaintiff, if the conditions expressly stated in the instruction were found in plaintiff's favor, *it entirely omitted the issue of plaintiff's contributory negligence*. The fact that this issue and other considerations were omitted from said instruction No. 14 but included in other instructions cannot cure the erroneous instruction, because a clear conflict is created. We direct attention to the cases cited on page 68 of our original brief.

Instruction No. 17

Respondent evades the errors in this instruction. Like No. 14, instruction 17 purports to lay down a formula under which the jury's verdict must be for the plaintiff, but wholly fails to take into consideration the issue of plaintiff's contributory negligence and is otherwise misleading.

Respondent discusses none of the remaining erroneous instructions.

An instruction calculated to probably do harm is prejudicial and reversible error. In *Jensen v. Utah Ry. Company*, 270 Pac. 349, 72 Utah 366, at page 400, the rule is stated thusly:

“Where the committed error is of such nature or character as calculated to do harm, or on its face as having the natural tendency to do so, prejudice will be presumed, until by the record it is affirmatively shown that the error was not or could not have been of harmful effect.”

INSTRUCTIONS DENIED

Respondent nowhere specifically points out where any of the instructions requested by defendant and refused by the court were fully and satisfactorily covered in other instructions given. The requested instructions refused by the court each presented a material issue

on defendant's theory of the evidence and the case, and a refusal to instruct on any one of such theories affects defendant's substantial rights and is reversible error.

Other substantial errors were assigned but not discussed by respondent. Some have a special significance in view of counsel's misconduct relating to insurance. Matters, such as reading in his argument to the jury from a deposition not in evidence (Assignment of Error No. 6), eliciting from his own witness, Gerald Franz, the fact that "his claim was taken care of," (Assignment of Error 28) making improper references to a criminal proceeding against the defendant, Kenneth Butte, (Assignment of Error 31) all prevented defendant from having a fair trial, and these and other assignments of error fully discussed in our original brief and not mentioned by respondent all merit consideration on this appeal.

CONCLUSION

As we view respondent's brief, he has in some instances merely attempted to avoid or cloud the issues, and in other instances ignored the unavoidable conclusion that prejudicial error was committed.

Appellant does not contend that a new trial cannot be granted where there has been a "plain disregard by

the jury of the instructions of the court," or "the evidence in the case as to satisfy the court that the verdict was rendered under a misapprehension of such instructions or under the influence of passion or prejudice." Our position as supported by the authorities is that it must clearly appear that there has been such a disregard by the jury; that a disregard is not evidenced where the questions of liability and damages are such as to justify reasonable men in reaching the conclusion which the jury reached. We have clearly pointed out in our original brief that the verdict on the first trial was justified by the facts and the law, and there was, therefore, no proper discretion to be exercised by the court. We also pointed out that the authorities hold that the disregard by the jury of the instructions and the evidence must be such as to make clear that the verdict "was rendered under a misapprehension of such instructions or under the influence of passion or prejudice."

We know of no case where there has been such a plain disregard of fair court procedure as is evidenced by this record. Prior to the impaneling of the jury, respondent stated his intention to interrogate the jury concerning insurance. He carried out this expressed intention to the letter. He claims the question asked Norma Chamberlain was a proper question on cross examination, but made no use of the statement referred to and in no manner attempted to impeach the witness although the very statement referred to by counsel was handed

to him in open court. This was followed by his argument to the jury and his statement wholly outside of the record that "an investigator was out at the scene of the accident." We regret the inclusion of the word "adjuster" at page 53 of our brief. While the record was identified by us, our statement should not have been in quotation marks. It is common knowledge, as recognized by the courts, that the words "investigator" and "adjuster" are used interchangeably and in either event, the jury could not have been mistaken that counsel meant "insurance investigator." Assignments of error relating to the question of insurance, with the record supporting them, preclude any conclusion other than that respondent intended that the jury should clearly understand that an insurance company was involved. We do not believe this court will place its stamp of approval on the trial of cases based on prejudicial misconduct such as was permitted by the trial court.

A court should not improperly instruct a jury contrary to statutory law, particularly when such instruction is based upon an ordinance invalid upon its face. While it is contended that appellant is estopped from asserting this invalidity, the fact remains that this court declared such ordinance invalid after the issues had been framed. The court should have instructed on the basis of the law announced by this court, and this is particularly true where appellant in open court excepted to the instruction. If the instruction was invalid

on its face, the verdict of the jury was based upon an improper statement of the law, and appellant should not be prejudiced when the trial court had an opportunity to correct its instruction, and particularly when, as pointed out, the error appeared upon the face of the ordinance, and extraneous evidence was not necessary to establish the invalidity.

Assignments of error relating to other instructions and not argued by respondent cannot be avoided. A general instruction, as pointed out by the authorities cited in our original brief, will not cure an erroneous mandate contained in another instruction.

Appellant respectfully submits that the trial court invaded the province of the jury in granting a new trial. Without any showing whatsoever, the trial court could not say that there was "a plain disregard by the jury of the instructions * * * or the evidence." The trial court could not say without any showing that the verdict was the result of "influence or passion or prejudice." The court could not say, contrary to the finding of eight jurors, that plaintiff, a father, was entitled to substantial damages on account of the death of a mature son, who lived months away from home, when plaintiff had other sons living with him and contributing to his support, and when he himself had a substantial income.

We submit that this court should not hold that the record of misconduct and error in this case was not prejudicial.

We respectfully submit that appellant should be granted the relief as prayed.

Respectfully submitted

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